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No. 88-413

In The

Supreme Court of the United States

October Term, 1988

RAYMOND L. BOVINO,

Appellant,

vs.

MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY AND THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF OPPOSING MOTION TO DISMISS

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Argument	1
Conclusion	6

TABLE OF AUTHORITIES

	Page
STATUTES	
28 U.S.C. § 1257	5

ARGUMENT

The legal issues posed by the Motion to Dismiss are fully addressed in appellant's Jurisdictional Statement. This Brief will focus on the facts, because the Motion to Dismiss is replete with falsehoods and misrepresentations, which only serve to underscore the crying need for a plenary review of the record in order to redress an injustice of constitutional proportions.

On page 3 of the Motion to Dismiss, appellee purports to describe what happened during the initial contact between Mr. Bovino and the young woman, which took place at the Board on December 27, 1985:

> Despite Chamber's direct instructions, Bovino continued to advise the client that abortion was wrong even though that was what she wanted. Bovino went on to say that it was not J.M.'s baby and J.M. had no right to decide if she wanted an abortion or not.

The record not only is devoid of any support for this scenario, but also directly contradicts it. There is no evidence whatsoever that Mr. Bovino continued to discuss abortion with the young woman after the "no preaching" directive. Three different witnesses (Mrs. Chambers, Mr. Bovino and the young woman) related what happened at the time of the "no preaching" order, and all three agreed on what happened. The administrative law judge ("ALJ") observed that "[t]he facts are not in dispute" (App. 2, at 6a); his findings with respect to the incident in question appear in Appendix 2, at 7a to 8a. Both the testimony and the findings make it clear that there was no discussion of abortion after the "no preaching" directive.

Thus, if the scenario described by appellee took place at all, it took place *before* the "no preaching" directive -- a critical distinction, in this case. Moreover, there is substantial doubt that Mr. Bovino made the remarks attributed to him, even before the directive. Although the young woman mentioned these remarks during her direct examination, on cross-examination she admitted that her earlier testimony was wrong:

> Q: Did [Mr. Bovino] tell you anything at the agency other than about the risks and options that you had?
>
> A. No.

Her testimony on cross-examination is consistent with the testimony of Mrs. Chambers and Mr. Bovino, and also with the findings of the ALJ.

In short, appellee's description of the incident is a complete distortion of the record concerning the nature and timing of Mr. Bovino's initial discussion with the young woman about abortion.[1]

The Board also misrepresents the brief contact between Mr. Bovino and the young woman on December 28, 1985. On page 5 of its Motion to Dismiss, the Board describes this meeting and asserts:

> Bovino told Spencer that [the young woman] was pregnant and was thinking of having an abortion, that her parents did not know of the pregnancy and that he was going to show her "the right way" by putting the baby up for adoption.

However, the Board's assertion is directly contradicted by the testimony of the three witnesses (Mr. Bovino, Miss Spencer and the young woman) who were present at the December 28 meeting. On cross-examination, the young woman admitted:

> Q. When [Mr. Bovino] showed up at your house with [Miss Spencer] the next day for a few minutes, did he tell you anything at all about abortion?
>
> A. ... No, I don't think he did, no.

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[1] It is also misleading for appellee to assert that abortion "was what she wanted." According to Mr. Bovino, the young woman told him during their initial encounter: "I don't know what I want to do." On cross-examination, the young woman admitted that she also told him: "[I]f I have this child, I know that I'll love it and would want to keep it myself." Upon questioning by the ALJ, she stated: "I was with [Mr. Bovino] because I wanted to have the kid." This is certainly not what one would expect from someone who supposedly wanted to abort her child. If the

Q. So he did not during that first occasion, correct?

A. That's correct, yes.

Similarly, the Board's description of the December 30 encounter at the Board's offices is in direct conflict with the testimony of Mr. Bovino and the young woman. According to the Board (on page 5 of its Motion to Dismiss), Mr. Bovino

> stated "that if you don't want a kid, then you should not go to bed with anyone, but now that you're having it, you should go through with the pregnancy." He also told [the young woman] that it was not her right to decide whether she wanted an abortion or not, that it was God's baby, and not [her] decision.

If such remarks were made, they were *not* made at the Board's offices, as the young woman admitted on cross-examination:

Q: On that afternoon, you were at the agency for only a few minutes, correct?

A. Yes.

Q. And during those few minutes, you did not discuss abortion, correct?

A. Yes.

Q. As a matter of fact, other than that first occasion on December 27, there were no other conversations at the agency with [Mr. Bovino] about abortion, were there?

A. No.

The ALJ found as a matter of fact: "There was no discussion during this [December 30] interview concerning the proposed abortion." App. 2, at 9a.

Board had bothered to listen to the young woman instead of immediately pressuring her to have an abortion, the tragic circumstances of this case could have been avoided.

Thus, the Board has deliberately misrepresented the facts to this Court. Contrary to the Board's false assertions, the record plainly shows that Mr. Bovino never discussed abortion with the young woman *in the workplace* after he was told not to do so. All post-directive discussions took place outside the office, on Mr. Bovino's own time,[2] and at the request of the young woman. Accordingly, the actual record -- as opposed to the Board's fanciful version of events -- starkly presents substantial constitutional issues that require plenary consideration on the merits.

The Board's disregard of the record carries over into its legal arguments. On page 11 of the Motion to Dismiss, the Board argues that its disciplinary action was *not* based solely on the alleged violation of the "no preaching" directive. This argument is directly contradicted by Appendix 1, at 2a, and by Appendix 2, at 5a. Indeed, the ALJ stated: "The sole basis of this case is insubordination and serious breach of discipline resulting from the appellant's alleged violation of his supervisor's direct order to him." App. 2, at 17a.

Similarly, the Board suggests (on page 11 and in footnotes 3 and 4 of its Motion to Dismiss) that Mr. Bovino breached client confidentiality and otherwise misused his official position. Based on the Board's own official notice of its disciplinary action, App. 1, at 2a, the ALJ "specifically noted that the charges of breach of client confidentiality and misuse of official position were dismissed after the departmental hearing." App. 2, at 16a to 17a. The Board never appealed the dismissal of these charges, so it cannot rely on them now to justify its conduct in this case. Moreover, it is undisputed that the young woman initiated the post-directive discussions with Mr. Bovino, so the Board's charges are completely without merit.

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[2] Contrary to the suggestion in footnote 4 of the Motion to Dismiss, there was nothing wrongful about Mr. Bovino's taking time off from work. He was entitled to take personal days, and was never charged with being absent without leave. *See* App. 1, at 2a. There was no showing that his time off caused any actual disruption of the agency's operations. The Board's current grasping at such straws is a measure of its desperation on the issue of disruption.

The Board's current reliance on the "totality of Bovino's actions" (page 11 of the Motion to Dismiss) to establish disruption is another crucial departure from its position below, where it argued only that Mr. Bovino's conduct "had a *potentially* disruptive effect." App. 2, at 13a (emphasis added). Moreover, the opinions below were limited to the theory of potential disruption; they did not in any way address or adopt the "totality" concept currently being raised by the Board. In addition, the particular actions considered offensive by the Board (footnote 4 of the Motion to Dismiss) either are facially non-disruptive or fall within footnote 5 of the Jurisdictional Statement.

The arguments set forth on pages 12-13 of the Motion to Dismiss relate primarily to the issue of vagueness; they do not address the merits of the more glaring problem of overbreadth. Whether or not the directive was "sufficiently clear," *see* Point II of the Jurisdictional Statement, it plainly reached protected conduct as well as unprotected conduct.[3] Unable to deny this fact, the Board instead tries to limit the overbreadth doctrine to "statutes" or "legislation." Any such limitation would give free rein to the "chilling effect" in precisely the area where constitutional protection is most likely to be needed -- the day-to-day oral commands which can be used to abuse subordinates and suppress their speech. The very purpose of the overbreadth doctrine is to check such unrestrained discretion to restrict the scope of free expression.

The Board also seems to assert that the "no preaching" directive merely ordered Mr. Bovino to "perform his job within its guidelines." Motion to Dismiss, at 8, 13. However, the Board's own witnesses admitted that the "guidelines" were routinely ignored, so their novel application to Mr. Bovino is inherently suspect. Moreover, the Board does not bother to supply this Court with the "guidelines" which were supposedly violated, so it is impossible to determine on this Motion whether the "guidelines" were narrowly drawn and reasonably applied. Furthermore, the Board's reliance on "guidelines" directly contradicts its position that this

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[3] The Board's own re-phrasing of the directive -- as an order "not to attempt to influence a client's choice" -- is overbroad for the reasons set forth on pages 14-15 of the Jurisdictional Statement.

case does not involve the type of agency regulation encompassed by the term "statute" in 28 U.S.C. §1257(2). The "no preaching" directive -- whether considered alone or in conjunction with the "guidelines" -- was clearly treated as a rule with continuing legal effect and carrying the force and sanction of law. Thus, it falls squarely within the precedents cited on page 3 of the Jurisdictional Statement and page 8 of the Motion to Dismiss.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Jurisdictional Statement, there is no valid factual or legal basis for appellee's Motion to Dismiss. Therefore, the Motion should be denied and this matter should be set down for plenary consideration on the merits.

Respectfully submitted,

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